2012 WL 5950471 (Mass.App.Ct.) (Appellate Brief)
Appeals Court Of Massachusetts.

Salvatore LICATA, Jr, Plaintiff-Appellee,
v.
GGNSC MALDEN DEXTER, LLC, Defendant-Appellant.

No. 2012-P-1251.
November 6, 2012.

On Appeal from the Suffolk County Superior Court

Brief of the National Academy of Elder Law Attorneys (MAssachusetts Chapter) and Aarp as Amici Curiae in Support of the Appellee

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***1 INTEREST OF AMICI CURIAE**

The National Academy of **Elder** Law Attorneys, Inc. (NAELA) is the national professional association of over 4,200 attorneys dedicated to improving the quality of legal services provided to seniors and people with special needs. The Massachusetts chapter of NAELA has over 500 members and is the leading organization of **elder** law professionals in the state. **Elder** law has developed as a separate specialty area because of the unique and complex issues faced by older persons and persons with disabilities. NAELA members assist their clients with planning for incapacity, long-term care, Medicaid and Medicare coverage, health and long-term care insurance, and health care decision-making, among other issues. AARP is a nonpartisan, nonprofit organization dedicated to addressing the needs and interests of people age fifty and older. Through education, advocacy, and service, AARP seeks to enhance the quality of life for all by promoting independence, dignity, and purpose. As the country's largest membership organization, AARP advocates for access to affordable healthcare and for controlling costs without compromising quality. AARP supports the ***2** establishment and enforcement of laws and policies designed to protect the rights of nursing facility residents to obtain redress when they have been victims of neglect or **abuse**.

Professionals in the fields of **elder** law and estate planning are dedicated to promoting public awareness of an individual's fundamental right to consent to or refuse medical treatment and the importance of advance directives in preserving that right. They are also uniquely qualified to provide practical advice to protect a client's right to appoint a surrogate decision-maker to make decisions on the client's behalf in case of incapacity and to provide advocacy to ensure that their clients' health care wishes are properly communicated and honored. Integral to the practice of **elder** law and estate planning is the need to prepare

the sometimes sophisticated legal documents that protect and enhance those rights under the Massachusetts health care proxy statute. See M.G. Gilfix & C. P. Sabatino, Health Care Decision Making in an **Elder** Law Practice, §16-1, **Elder** Law Portfolio Series (2009).

NAELA and AARP members' long history and substantial experience in promoting awareness of the ***3** health care proxy statute and the rights of patients gives them a unique perspective on the importance of maintaining the integrity of and clarifying the health care agent's role. Attorneys from the amici organizations have a longstanding interest in the correct and consistent application of the Massachusetts health care proxy statute and a direct role in protecting the right of individuals to have their health care wishes honored.

HISTORY OF PROCEEDINGS

On August 1, 2011, Salvatore Licata, Jr. (Plaintiff), administrator of Rita Licata's estate, filed a complaint in Suffolk Superior Court alleging that GGNSC Malden Dexter LLC (Defendant) failed to provide proper and competent care, resulting in Rita Licata's death. On October 7, 2011 Defendant (a nursing home) filed a Motion to Dismiss the Complaint and Compel Arbitration. The same day, Plaintiff filed an Opposition to Defendant's Motion. On January 30, 2012, the Court held an evidentiary hearing to determine the enforceability of the arbitration agreement.

By Order dated March 8, 2012, the Court found the arbitration agreement unenforceable and denied ***4** Defendant's Motion to Dismiss the Complaint and Compel Arbitration. Licata vs. GGNSC Malden Dexter LLC, SUCV2011-02815-A (Mar. 8, 2012). On March 20, 2012, Defendant filed a Notice of Appeal with Suffolk Superior Court. On September 12, 2012 Defendant filed Defendant/Appellant's Brief with this Court.

ARGUMENT

I. THE MASSACHUSETTS HEALTH CARE PROXY STATUTE DOES NOT, AND WAS NEVER INTENDED TO, AUTHORIZE AN AGENT TO WAIVE A PATIENT'S RIGHT TO A JURY TRIAL.

A. HISTORICAL CONTEXT

The common law has long recognized an individual's fundamental right to control his own person without interference from others, including health care providers. As stated by Justice Benjamin Cardozo nearly a century ago, “every human being of adult years and sound mind has a right to determine what shall be done with his own body.” Schloendorff v. Soc‘y of New York Hosp., 211 N.Y. 125, 130 (1914). By extension, the right to refuse medical treatment is universally recognized as a fundamental liberty interest. Massachusetts has “long been a leader in finding a right to refuse medical treatment on both common law and constitutional grounds, and was one of the forerunners in adopting the ‘substituted judgment’ ***5** doctrine.” Murphy & Wermuth, The Right to Decline Medical Treatment in Massachusetts, 76 Mass. Law Rev. 131, 132 (1991). However, these rights are compromised when patients are unable to communicate their wishes or because family members or providers insist on continuing treatment.

Public interest in end-of-life care has grown steadily since 1976, when a New Jersey court granted Karen Ann Quinlan's parents permission to remove her ventilator. *See In re Quinlan,* 70 N.J. 10 (1976). On June 25, 1990, the U.S. Supreme Court held that individuals have a federal constitutional right to refuse nutrition and hydration, but that a state could require clear evidence that an incapacitated person had expressed wishes that were used by a surrogate decision-maker. *See Cruzan v. Dir., Missouri Dep't of Health,* 497 U.S. 261 (1990). The *Cruzan* decision highlighted the importance of providing advance directives for future medical care in case of incapacity. The Massachusetts legislature responded by enacting the health care proxy statute. The statute, G.L. c. 201D, gives every adult the opportunity to designate a surrogate health care agent ***6** and provides that a duly executed advance directive is binding upon Massachusetts health care providers. [1]

B. THE PLAIN LANGUAGE OF THE HEALTH CARE PROXY STATUTE AUTHORIZES AN AGENT TO MAKE ONLY "HEALTH CARE" DECISIONS.

The legislature clearly intended that a health care agent's authority be narrowly defined, placing several significant limitations on that authority. First, the agent's authority extends only to "health care decisions." G.L. c. 201D, § 5. Nowhere in the statute is the term "decision" used without being modified by "health care." The statute carefully defines "health care" as "any treatment, service, or procedure to diagnose or treat the physical or mental condition of a patient." Id., § 1. Second, the statute states that the agent shall make health care decisions "after consultation with health care ***7** providers, and after full consideration of acceptable medical alternatives regarding diagnosis, prognosis, treatments and their side effects." Id., § 5. Finally, the agent's authority does not take effect unless and until the principal's attending physician makes a written determination that the principal lacks the capacity to make or communicate health care decisions. Id., § 6. Underlying all of these limitations on the health care agent's authority is the fundamental principle that an individual's right to make fundamental personal decisions on his or her own behalf should not be displaced unless absolutely necessary. An unduly broad reading of the health care agent's authority would undermine this right.

C. THE LEGISLATIVE HISTORY DEMONSTRATES AN INTENT TO CONFINE A HEALTH CARE AGENT'S AUTHORITY TO THE REALM OF HEALTH CARE.

The legislative history of the statute confirms its plain meaning. The health care proxy statute evolved from four different bills each pertaining to the delegation of health care or medical decision-making. 1990 House Bill No. 1723; 1990 House Bill No. 3006; 1990 House Bill No. 3366; 1990 House Bill No. 3367. House Bills No. 1723 and 3366 both provided for living wills. 1990 House Bill No. 1723; 1990 House ***8** Bill No. 3366. The living wills they described allowed a person to authorize another only to "order the administration, withholding, or withdrawal of life prolonging procedures in the event that the [person] becomes incompetent." Id. These two bills specifically limited the power of the authorized agent only to end-of-life decisions. House Bill No. 3367 proposed an addition to the durable power of attorney statute authorizing the "attorney-in-fact to enter into agreements concerning the care of the principal or concerning medical or surgical procedures." 1990 House Bill No. 3367. Lastly, House Bill No. 3006 proposed the creation of a health care proxy. 1990 House Bill No. 3367. All four of these bills were referred to the Committee on the Judiciary, which then recommended the passage of House Bill 5906 creating a health care proxy. 1990 House Bill No. 5906. House Bill 5906 ultimately became the G.L. c. 201D.

The rejection of both the living will and medical durable power of attorney options resulted in a compromise between providing a health care agent with very expansive powers (i.e, expanding the durable power of attorney), and limiting the agent's authority to end-of-life decisions (i.e., recognizing living ***9** wills). Further, the rejection of House Bill No. 3367 reflects the legislature's decision to separate durable powers of attorney from health care proxies. This dichotomy reflects the legislature's intent that the health care agent's authority be limited to purely medical or health care decisions, while leaving other decisions to the attorney-in-fact acting under a durable power of attorney. There is no indication whatsoever that the legislature intended to extend a health care agent's authority beyond purely medical decisions.

In sum, the health care proxy statute gives a health care agent only the authority to consent to or refuse medical treatment when it is proffered. By contrast, a decision to arbitrate involves a waiver of the constitutionally protected right to a jury trial and a choice of a mechanism for dispute resolution. The issues for arbitration may include negligence and other claims that arise after treatment has been given, as well as payment and collection disputes.

The decision or agreement to arbitrate and related issues cannot reasonably be considered to involve any "treatment, service or procedure to diagnose or treat illness," and are therefore well ***10** outside the scope of the agent's authority. Expanding the health care agent's role to include the authority to agree to arbitration violates both the plain meaning and legislative intent of the Massachusetts health care proxy statute.

II. BECAUSE FUNDAMENTAL RIGHTS ARE AT STAKE, ARBITRATION PROVISIONS SIGNED BY AN AGENT MAY NOT BE UPHELD ABSENT EXPRESS AUTHORIZATION.

In advising clients about planning for incapacity and surrogate decision making, **elder** law and probate attorneys typically help their clients decide who will be best suited and qualified to make decisions on the clients' behalf in the event of incapacity. Since those decisions fall into two separate spheres and require different abilities, attorneys often advise their clients to choose one person to handle financial and legal decisions (i.e., under a durable power of attorney) and another person to make health care decisions (i.e., under a health care proxy). [2] For ***11** example, clients might choose a child with a background in business or law to act as attorney-in-fact, and a child who is a health care professional to act as health care agent. T.D. Begley & J.H. Jeffreys, Representing the **Elderly** and Disabled Client, §14.10 (2012). Clients would generally consider different skill sets of individuals being considered for these roles.

Merely designating a qualified health care agent, however, is not sufficient to ensure that a client's wishes will be honored. The health care proxy should be personal and specific, and clients should communicate their particular wishes about medical decisions, particularly end-of-life treatment decisions, to their chosen agents. Id. An exploration of these issues may encompass deeply personal matters, including the client's religious and spiritual beliefs. Id. Many attorneys recommend that this information be communicated by means of a values survey, which asks questions about personal beliefs and end-of-life care, [3] questions that are in no way ***12** connected with a decision to arbitrate, and, indeed, operate on a completely different emotional level.

A decision to arbitrate involves a waiver of the constitutionally protected right to a jury trial and a choice of a mechanism for dispute resolution. These issues fall far beyond the factors that a client could reasonably be expected to consider in choosing a health care agent. The qualities that would make an ideal health care agent (e.g., knowledge of the principal's personal wishes and values, the ability to evaluate complex medical information and communicate decisions) do not necessarily qualify someone to make a decision about arbitration.

The surrogate's background and qualifications are critical. In affirming the authority of an attorney-in-fact acting under a durable power of attorney to agree to arbitration on behalf of a nursing home ***13** resident, the SJC carefully reviewed the agent's background before concluding that he had sufficient business acumen to make such a decision:

> Miller showed an understanding of contracts and the language used in them during his deposition. He holds a degree in English from Tufts University, and served as an intelligence officer in the United States Air Force. After leaving the military, Miller spent twenty-seven years in the insurance industry, working as a claims examiner and as a regional claims manager in a variety of divisions of his company (including medical and disability). Because of his work, he had a knowledge of arbitration, and "assume[d]" that his automobile and home insurance policies included arbitration provisions. Miller also showed himself to have an extensive understanding of his rights and responsibilities under both his father's power of attorney and the health care proxy. He had signed admission agreements for his father at several other facilities, and had done the same for his mother.

Miller v. *Cotter*, 448 Mass. 671, 674 (2007).

Finally, by its very nature, a nursing home admission almost always represents a time of crisis for both the patient and the family. See R. J. Benson, Check Your Rights at the Door: Consumer Protection Violations in Massachusetts Nursing Home Admission Agreements, 3-4 (University of Massachusetts Gerontology Institute 1997); *Podolsky* v. *First Healthcare Corp.*, 50 Cal.App.4th 632, 652-653 (1996) ***14** (noting that, during the admission process, family members are handed a stack of papers and asked to sign with no opportunity for explanation or negotiation). Because of what is at stake for the patient - a blanket waiver of the right to sue, even for grievous injury, without any corresponding benefit - it is particularly important that the arbitration decision be made by someone who is expressly authorized and well-qualified to do so.

III. COURTS NATIONWIDE HAVE HELD THAT A HEALTH CARE AGENT MAY NOT WAIVE A PATIENT'S RIGHT TO A JURY TRIAL.

Courts throughout the country are virtually unanimous in declining to enforce arbitration agreements against a nursing home resident unless the signatory had express authority to make such an agreement. E.g., *Dickerson v. Longoria*, 414 Md. 419, 445 (2010) (noting that several courts have concluded that the authority to make medical decisions does not extend to signing arbitration agreements); *Lujan v. Life Care Ctrs. of Am.*, 222 P.3d 970, 978 (Colo. Ct. App. 2009) ("the power to make life and death decisions is clearly within the statutory authority provided to a health care proxy... [but] the decision to enter into an arbitration agreement is ***15** not"); *Life Care Ctrs. of Am. v. Smith*, 298 Ga.App. 739 (2009) (daughter who was appointed as health care agent lacked authority to bind her mother to arbitration agreement); *McNally v. Beverly Enters.*, 191 P.3d 363 (Kan. App. 2008) (durable power of attorney for health care did not confer authority to sign arbitration agreement); *Texas Cityview Care Ctr. v. Fryer*, 227 S.W.3d 345, 352 (Tex.App.2007) (holder of medical power of attorney lacked authority to sign arbitration agreement because nothing in medical power of attorney indicated it was intended to confer authority to make legal rather than health care decisions); *Koricic v. Beverly Enterprises-Nebraska, Inc.*, 278 Neb. 713 (2009) (refusing to compel arbitration because son who signed nursing home admission documents on his mother's behalf lacked authority to agree to arbitrate); *Blankfeld v. Richmond Health Care*, 902 So.2d 296, 301 (Fla. Dist. Ct. App. 2005) (holder of health care proxy did not have authority to waive right to trial by jury by signing arbitration agreement). [4] *See also* ***16** *Mississippi Care Ctr. of Greenville, LLC v. Hinyub*, 975 So.2d 211 (Miss. 2008) (arbitration agreement that was not required as a condition of admission could not be considered a health care decision by health care surrogate). *But see Owens v. Nat'l Health Corp.*, 263 S.W.3d 876(Tenn. 2007) (where arbitration agreement was required as a condition of admission to the facility, health care agent had authority to sign).

In a case nearly identical to the one at issue, the Georgia Court of Appeals recently held that a daughter who was duly appointed as a health care agent lacked the power to agree to arbitration. Smith, 298 Ga.App. at 742. The court acknowledged that the health care proxy expressly gave the daughter very broad authority, "so that [the] agent will have authority to make any decision [the principal] could make to obtain or terminate any type of health care." Id. at 740. Nevertheless, the court found that this authority was not so broad as to authorize the ***17** daughter to sign away her mother's right to a jury trial. Id. at 742.

This Court should reach the same conclusion in this case.

CONCLUSION

For the reasons set forth above, the amici submit that the Superior Court correctly interpreted the authority of the Plaintiff's health care agent in this case, and that a broader reading of that authority would violate the intent of the health care proxy statute, create confusion about the proper role of a health care agent, and depart from the overwhelming weight of authority. The court's decision below should be affirmed.

Footnotes

1 Directly following the Cruzan decision, Congress passed the first federal legislation concerning surrogate health care decision-making, the Patient Self-Determination Act of 1990 (sections 4206 and 4751 of the Omnibus Budget Reconciliation Act of 1990, P.L. 101-508, 42 U.S.C. §§ 1395cc & 1996a, effective December 1, 1991). All health care providers that participate in Medicare and Medicaid are required to provide written information to patients at admission about surrogate decision-making and the right to refuse treatment. The law also requires providers to honor duly-executed health care directives. Providers that do not comply face the loss of Medicare and Medicaid funding.

2 This clear dichotomy between financial/legal matters and personal/medical decisions is mirrored in the Massachusetts Uniform Probate Code. That statute codified the distinction between the appointment of a conservator, who has authority only to manage

property, and a guardian, who has authority only over personal and medical decisions. G.L. c. 190B, §5-309 (guardianship) and G.L. c. 190B, §5-423 (conservatorship).

3 While not legally binding, a values survey can provide helpful guidance to a health care agent. One of the first values surveys for health care decisions was developed by the University of New Mexico Institute of Ethics, and includes sections entitled "Attitude Toward Life and Health," "Thoughts About Independence and Self-Sufficiency," and "Religious Background and Beliefs," among others. http://hsc.unm.edu/som/ethics/docs/Values_ History.pdf (last viewed October 19, 2012). Neither this survey, nor any of the other surveys known to the amici, addresses the patient's wishes concerning alternative dispute resolution or the waiver of the right to a jury trial.

4 In a rare exception to this nationwide trend, California courts have issued decisions that are difficult to reconcile. Compare, e.g., *Garrison v. Superior Court of Los Angeles*, 132 Cal. App. 4th 253 (2005) (holder of a health care power of attorney had the power to agree to arbitration) with *Flores v. Evergreen* at San Diego, 148 Cal. App. 4th 581, 590 (2007) (principal could not be compelled to arbitrate because the legislature had not specifically conveyed authority over arbitration decisions in health care proxy legislation).

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